SUPREME COURT, U. S.

JAN 17 1969

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 647

SALLIE M. HADNOTT; REVEREND WILLIAM McKINLEY BRANCH; JACK DRAKE; JOHN HENRY DAVIS; ROBERT P. SCHWENN; THOMAS WRENN; DR. JOHN L. CASHIN, JR.; and THE NATIONAL DEMOCRATIC PARTY OF ALABAMA, a corporation, for themselves jointly and severally, and for all others similarly situated,

Appellants,

v.

MABEL S. AMOS, as Secretary of the State of Alabama; EDWARD A. GROUBY, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama, jointly and severally, who are similarly situated; ALBERT P. BREWER, as Governor of the State of Alabama; MacDONALD GALLION, as Attorney General of the State of Alabama, and their successors in each office,

Appellees,

EDWARD F. MAULDIN, as Chairman of Alabama Citizens for Humphrey-Muskie, for himself and all other persons similarly situated,

Appellee-Intervenor,

and,

JAMES DENNIS HERNDON, Judge of Probate of Greene County, Alabama,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA AND IN THE MATTER OF CONTEMPT OF COURT BY JAMES DENNIS HERNDON.

BRIEF OF JAMES DENNIS HERNDON

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QUESTION PRESENTED

Whether this Court should issue against the Defendant, James Dennis Herndon, its rule to show cause, if any he have, as to why he should not be adjudged in contempt of this Court.

STATEMENT OF THE CASE

1. Appellants instituted suit in the United States District Court of the Middle District of Alabama on September 13, 1968, against certain officials of the State of Alabama including the Governor, Attorney General, Secretary of State, together with "Edward A. Grouby, as Judge of Probate for Autauga County, Alabama; and all other Judges of Probate of the State of Alabama jointly and severally, who are similarly situated."

2. On September 18, 1968, the United States District Court for the Middle District of Alabama issued its Temporary Restraining Order requiring all ballots for the general election to be held on November 5, 1968, to include the names of all State and appropriate local NDPA candidates. A copy of this Temporary Restraining Order was served on the Defendant, James Dennis Herndon, by certified mail.

3. While this Temporary Restraining Order was in force, the Defendant, James Dennis Herndon, ordered from the printer the paper absentee ballots to be used in Greene County in connection with the election of November 5, 1968, and directed that the names of all State and appropriate local NDPA candidates be included thereon.

4. On October 11, 1968, the United States District Court for the Middle District of Alabama entered its Order dissolving the Temporary Restraining Order previously issued in this cause and further holding the Alabama Corrupt Practices Act and the Garrett Act to be constitutional on their face and as applied, but enjoining the Defendants from disqualifying any NDPA candidate for the alleged failure to conduct a mass meeting in Huntsville on May 7, 1968.

5. On October 14, 1968, a copy of this order was served by certified mail upon the Defendant, James Dennis Herndon, and on said date, the Defendant, James Dennis Herndon, ordered from the printer the Greene County ballots to be used in the general election of November 5, 1968. The names of NDPA candidates for local office in Greene County were not included on this ballot for the reason that the Defendant, James Dennis Herndon, had determined such candidates failed to comply with the Alabama Corrupt Practices Act requirements.

6. On October 12, 1968, Appellants filed in this Court an application for restoration of the temporary relief praying: ". . . . that the Temporary Restraining Order of the United States District Court for the Middle District of Alabama be restored during the pendancy of this Appeal . . . .".

7. On October 14, 1968, this Court granted Appellants application for restoration of Temporary relief pending oral argument on October 18, 1968.

8. On October 19, 1968, this Court continued its order restoring the temporary relief pending action on the jurisdictional statement.

9. No copy of the orders of this Court of October 14, 1968, or October 19, 1968, were ever served upon or otherwise delivered to the Defendant, James Dennis Herndon.

10. On November 5, 1968, the general election was conducted in Greene County, Alabama with the ballots ordered by the Defendant, James Dennis Herndon, on October 14, 1968, which ballots did not include the names of local NDPA candidates for county office.

11. On or about November 15, 1968, Appellants filed in this Court a Motion for an Order to Show

Cause as to why James Dennis Herndon should not be held in contempt for failure to include the names of local NDPA candidates for county office on the ballot used in the general election of November 5, 1968, in Greene County, Alabama. The Appellants in this Motion aver that they ". . . . are informed and believe and based upon the following aver that said failure and refusal of the Defendant, James Dennis Herndon to place the names of the above named NDPA nominees on the ballot was done willfully and with actual knowledge of the order of this Court."

12. On or about the 29th day of November, 1968, the Defendant, James Dennis Herndon, filed in this Court his response to Appellants' Motion for Rule to Show Cause in which he unequivocally denies under oath that the omission of the names of the candidates of the NDPA for county offices upon the official ballot for the general election held on November 5, 1968, was willfully or contumaciously done with knowledge of the said orders of this Court.

13. On November 20, 1968, the United States filed a series of Motions in this case in the United States District Court for the Middle District of Alabama seeking relief in several respects. Pursuant to these motions, said United States District Court entered orders on November 21, 1968: (1) Designating the United States as an Amicus Curiae and a party in the case; (2) Adding as a party defendant in the United States District Court for the Middle District of Alabama in this cause, the Defendant, James Dennis Herndon and others; (3) Directing the Defendant, James Dennis Herndon, and others, to show cause, if any they have, why they should not be restrained pending a final determination of this action from giving

effect to the results of the November 5, 1968, election in Greene County for local county offices.

14. On December 20, 1968, the United States District Court for the Middle District of Alabama issued its order, with consent of the Defendant, James Dennis Herndon, and others, enjoining and restraining the Defendant, James Dennis Herndon and others from giving effect to the results of the November 5, 1968, election in Greene County for local county offices.

ARGUMENT

I.

There is no showing in this case of probable cause to believe that the Defendant, James Dennis Herndon, willfully and with actual notice of this Court's order restoring the Temporary Restraining Order issued by the United States District Court for the Middle District of Alabama, omitted from the Greene County ballot the names of NDPA candidates for local county offices.

The Motion for Rule to Show Cause filed by Appellants against the Defendant, James Dennis Herndon, in this Court alleges in substance that based upon certain averred facts, Appellants believe that the acts complained of were willfully done by the Defendant, James Dennis Herndon, with actual knowledge of the order of this Court. The facts averred as the basis for such belief are: that the order was widely publicized and was a matter of common knowledge among residents of Alabama associated with the State's political life; that one of the counsel for the Appellees was notified by telephone of the entry of said order on October 19, 1968; and that the Defendant, James Dennis Herndon, had provided "varying" reasons for the omission

of such names from the ballot. Analysis of these matters asserted as the basis for Appellants' belief will show that Appellants' conclusion is unwarranted.

All orders of the United States District Court for the Middle District of Alabama which affected the Defendant, James Dennis Herndon, were served upon him by certified mail. Admittedly, no copy of any order of the Supreme Court of the United States was served upon or delivered to him by anyone. The Appellants do not so contend. The Appellants do contend, however, that the Defendant, Judge Herndon, had actual notice by virtue of publicity in the local news media concerning this Court's orders in this case.

Judge Herndon, in his deposition, has testified that he became aware that an appeal was taken from the judgment of the United States District Court for the Middle District of Alabama to the Supreme Court and became aware that NDPA presidential electors would be included on the ballot for the general election of November 5, 1968. He did not understand from the the articles seen by him that such order had application to local NDPA candidates for county office. This conclusion was further strengthened by the fact that no copy of any order of this Court was mailed or otherwise delivered to him. Within the week after the recepit by him of the October 11, order of the United States District Court for the Middle District of Alabama dissolving the Temporary Restraining Order, the Defendant, James Dennis Herndon, notified Mr. Peter J. Kirksey, Chairman of the Greene County NDPA that the names of local candidates of the NDPA for county office would not appear on the November 5, 1968, general election ballot. Mr. Kirksey is the person who filed the certificate of mass meeting with Judge

Herndon nominating the six local NDPA candidates. Judge Herndon also notified Mr. William McKinley Branch, NDPA candidate for the United States House of Representatives from the Fifth District of Alabama, that the local NDPA candidates for county office would not appear on the general election ballot for November 5, 1968, because of their failure to comply with the Alabama Corrupt Practices Act requirements.

Viewed in the light of the above facts as shown by the sworn response of the Defendant, James Dennis Herndon, heretofore filed in this Court and in the Deposition of Judge Herndon taken by Appellants and filed as a part of the record herein, it is clear that the reasons assigned by Judge Herndon for the omission of local NDPA candidates for county office from the Greene County ballot for the election of November 5, 1968, are not "varying" as alleged by Appellants. Assuming that the conversations with Judge Herndon are accurately reported, there is no inconsistency or variation between the reasons then and now assigned by Judge Herndon for his action. In the affidavit of Dr. John L. Cashin, Jr. (Ex. A to Motion for Rule to Show Cause) it is obvious that the Court order referred to by Judge Herndon is the order of the United States District Court for the Middle District of Alabama entered on October 11, 1968. Both of the newspaper articles attached to the Motion for Rule to Show Cause (Ex. B and C) evidence an understanding on Judge Herndon's part that the local NDPA candidates for county office did not participate in the appeal and that the order to the Supreme Court had no application to them. Considering the opportunity for misconstruction in the newspaper rewrite room, the newspaper articles state in remarkably few words precisely

the same thing that Judge Herndon has said in his response heretofore filed in this Court and in his deposition.

Appellants further assert that on October 19, 1968, the Clerk of this Court notified Mr. John Bookout, Deputy Attorney General of the State of Alabama, and one of the attorneys of record for Appellees in this cause, by telephone of the entry of the order of October 19th. Such notification to Mr. Bookout was neither actual nor constructive notification to the Defendant, James Dennis Herndon.

This action was instituted as a class action against Judge Edward A. Grouby, as Probate Judge of Autauga County, Alabama, as representative of the Probate Judges of Alabama similarly situated, and was allowed by the Court to be prosecuted as a class action. The reason for allowing class actions is to eliminate the inconvenience and expense of making all persons of the class affected parties when less than all adequately represent the interests of the class. While all members of the class are obviously bound by the adjudication, only those who are named and served as representatives of the class are "parties".

The United States District Court for the Middle District of Alabama recognized that the Defendant, James Dennis Herndon, was not a "party" to the original proceedings in this cause, and on November 21, 1968, entered an order adding James Dennis Herndon as a party Defendant in this case in response to the Motion of the United States praying such action. Admittedly, Mr. Bookout did not notify Judge Herndon. Obviously, notice of the entry of an order given to counsel of record is not constructive notice to the members of a class who are not themselves "parties" to the suit.

It seems clear that there is neither allegation nor evidence that Judge Herndon had actual or constructive knowledge of the orders of this Court entered on October 14th and 19th restoring the temporary relief granted by the United States District Court for the Middle District of Alabama at any time prior to the general election held on November 5, 1968. On the contrary, there is every reason to believe that Judge Herndon did not willfully disobey this Court's orders. In the first place, no conceivable purpose would be served by such disobedience. To willfully disobey would be but to invite severe adverse consequences. The fact is, that in May of 1968, each of the present NDPA candidates for county office ran in the Democratic primary as a candidate for the Democratic nomination for such office. Each of the present NDPA candidates properly qualify to run in the Democratic primary and their names were each placed on the ballot. There was no suit or judicial compulsion to force the inclusion of these candidates on the Democratic primary ballot, yet when they properly qualified, Judge Herndon properly placed their names on the ballot.

Absentee ballots must be ordered and made available several weeks in advance of the general election. Judge Herndon ordered the Greene County absentee ballots in September, 1968, during the pendancy of the Temporary Restraining Order issued by the United States District Court for the Middle District of Alabama. Judge Herndon had knowledge of this Temporary Restraining Order, a copy of it having been forwarded from the Court to him by certified mail. In obedience to this order, Judge Herndon included the names of the local NDPA candidates for county office on the absentee ballots. In each of these instances, the same

identical candidates were seeking the same offices against the same opponents in the same year in Greene County. When these candidates properly qualified for the Democratic primary, Judge Herndon obeyed the law without any judicial compulsion and placed their names upon the ballot. With regard to the absentee ballot for the general election, Judge Herndon placed these candidates' names on the absentee ballots in obedience to the Temporary Restraining Order issued by the United States District Court for the Middle District of Alabama, although he considered that they had failed to comply with the Corrupt Practices Act. These are not the acts of a man who would willfully defy an order of the Supreme Court of the United States of which he had knowledge.

It is respectfully submitted that Appellants' allegations and evidence fail to show probable cause to believe that the Defendant, James Dennis Herndon, has willfully disobeyed any order of Court with actual knowledge thereof and that Appellants' Motion for Rule to Show Cause should be denied.

II.

The Defendant, James Dennis Herndon, respectfully submits that the proper forum for further inquiry concerning this matter, if such be indicated, is the United States District for the Middle District of Alabama.

It is the Temporary Restraining Order of the United States District Court for the Middle District of Alabama which Appellants charge this Defendant has violated. This Temporary Restraining Order has initially granted by the United States District Court for the Middle District of Alabama on September 18, 1968,

and after having been once extended was dissolved by that Court on October 11, 1968. On October 12, 1968, an application for restoration of temporary relief previously granted by the United States District Court for the Middle District of Alabama was filed in this Court. The prayer of such application was: ". . . . that the Temporary Restraining Order of the United States District Court for the Middle District of Alabama be restored during the pendancy of this appeal. . . . . " On October 14, 1968, this Court granted Appellants' application for restoration of temporary relief by an order reading in part as follows: "The application for restoration of temporary relief is granted pending oral argument on the application which is set for Friday, October 18, 1968, at 9:00 a.m." On October 19, 1968, this Court continued in effect its order of October 14, said order providing in part as follows: "The order entered October 14, 1968, restoring Temporary relief is continued pending action upon the jurisdictional statement which has been filed."

It is respectfully submitted that the effect of the foregoing orders is to re-vitalize the Temporary Restraining Order of the United States District Court and did not amount to the issuance of a Temporary Restraining Order by this Court. This is not such a situation as was presented in *United States v. Ross R. Barnett, et al.*, 376 US 681. In the *Barnett Case*, the Appellate Court, the Court of Appeals for the Fifth Circuit, had actually issued its own Temporary Restraining Order. There was a similar permanent injunction issued by the District Court pursuant to mandate from the Court of Appeals. However, the conduct of the Defendants was alleged to violate both the Temporary Restraining Order of the Court of

Appeals and the permanent injunction of the District Court. Under such circumstances it was apparent that either the Court of Appeals or the District Court could entertain a contempt proceeding against the Defendants. In the present case, the only injunctive order issued is that of the United States District Court for the Middle District of Alabama. It is this injunctive order which Appellants charge this Defendant with violating. The United States District Court for the Middle District of Alabama is the proper forum for any further proceedings in connection with this matter, if the same should be indicated.

There are many practical reasons for this conclusion. The United States District Court for the Middle District of Alabama added this Defendant as a party Defendant in this suit in that Court on November 21, 1968, and did on December 20, 1968, issue its Temporary Injunction enjoining and restraining this Defendant and others from giving effect to the results of the November 5, 1968, election in Greene County for the county offices here involved. Thus, the District Court is presently exercising jurisdiction over this Defendant in this case and is presently protecting the Appellants by this Temporary Injunction, from the consequences of the omission of the names of the local NDPA candidates for county office from the November 5, 1968, general election ballot.

In a proper case, it is obvious that an Appellate Court must sometimes undertake the hearing of a contempt proceeding. Such a trial can be accomplished by having the evidence taken before a commissioner as was done in the case of *United States of America v. Joseph F. Shipp, et al.*, 203 US 563, or the evidence could be heard by the Court. The problems of such pro-

ceedings were pointed up by Mr. Justice Black in his dissenting opinion in *United States v. Barnett*, 376 US 681, wherein he said:

> "The business of trial courts is to try cases. That of Appellate Courts is to review the records of cases coming from trial courts below. In my judgment it is bad for Appellate Courts to be compelled to interrupt and delay their pressing Appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work."

The Solicitor General in his Brief in this cause for the United States as Amicus Curiae, concludes at page 33 of his Brief that the proper course with regard to the contempt aspect of this proceeding is: "To undertake such further proceedings as the District Court may deem appropriate with respect to the alleged contempt of orders issued in this cause by Probate Judge Herndon or other officials, as circumstances may suggest." By footnote to the foregoing statement, the Solicitor General suggest further proceedings in the District Court with respect to the Motion for contempt because: "As presently advised, we do believe the necessary facts have been developed and deem the further exploration of the issue here premature." This Defendant concurs with these conclusions of the Solicitor General.

CONCLUSION

For the reasons stated this Defendant concludes:

1. That there is neither allegation nor evidence of any willful violation by this Defendant of any order of this Court or of the United States District Court for the Middle District of Alabama;

2. That the proper forum for the further investigation of this Defendant's alleged contempt, if such be indicated, is the United States District Court for the Middle District of Alabama;

3. That the Motion of Appellants for the issuance of a Rule to Show Cause why he should not be adjudged in contempt of this Court should be denied.

Respectfully submitted,

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AND
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of the Defendant, James Dennis Herndon, on Honorable Charles Morgan, Jr., 5 Forsyth Street, N.W., Atlanta, Georgia 30303, Honorable Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama 35203, and Honorable George W. Dean, Jr., P. O. Box 248, Destin, Florida, Attorneys for Appellants, and upon Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C., Attorney for *amicus curiae*, and Honorable L. Drew Redden, Special Assistant Attorney General of Alabama, 1033 Frank Nelson Building, Birmingham, Alabama 35203, this 16th day of January, 1969.

PERRY HUBBARD, *of Counsel for the Defendant James Dennis Herndon*